

U.K. AND E.E.C. APPROACHES TO COPING WITH THE ECONOMIC ASPECTS OF NATIONAL SECURITY AND FOREIGN POLICY

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In very general terms there is no doubt that national security and foreign policy interests are reflected in the United Kingdom's foreign trade policy. It can be safely asserted that there is close cooperation at the institutional level between private industry and the government with regard to these matters. Yet as one moves away from such generalized statements and attempts to give a detailed account of the interaction that does exist, the lack of visibility of this interaction becomes apparent. The relatively closed nature of government in the United Kingdom¹ and the lack of enthusiasm that seems to persist with regard to on-the-record briefings of the press, let alone the public,² mean that the true nature of the interaction between government and private industry has to be gleaned almost exclusively from the occasional indicia that surface.

One of the most dramatic examples of government-private industry interaction occurred in the spring of 1980. There were reports that intense pressure was being placed on the British government to block the televising of the film *Death of a Princess*, co-produced by British ATV and Boston's WGBH-TV. It is at least arguable that both foreign policy and economic in-

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1. Crick, *"Them and Us": Public Impotence and Government Power*, 1968 PUB. LAW 8.

2. It is not intended to give the impression that government in the United Kingdom is *always* actively covert, but rather that the public's *access* to what public decisionmaking does exist is severely limited because of *e.g.*, the prohibition on T.V. coverage of Parliamentary proceedings. Additionally, it should be noted that ancillary Parliamentary bodies lack the sophistication and openness of their U.S. analogues; *see, e.g.*, Casper, *The Committee System of the United States Congress* 26 AM. J. COMP. L. (Supp.) 359 (1978).

terests favored cancellation of the program, but the strength of the British media lobby ensured that the film was not only broadcast, but also distributed outside the United Kingdom. The failure of the combined government and industry pressure led to temporary economic and political reprisals by the Saudi Arabian government.³ Similarly, in the United States, neither White House nor oil industry pressure could dissuade PBS from airing the program.⁴ Recourse to the courts, either before or after the telecast, was generally unprofitable,⁵ although one case did go to trial.⁶

3. N.Y. Times, Apr. 24, 1980, §A, at 7, col. 1; Apr. 25, 1980, §C, at 28, col. 1; May 7, 1980, §C, at 21, col. 1; May 11, 1980, §D, at 37, col. 1; Jun. 26, 1980, §d, at 1, col. 1; Jul. 27, 1980, §A, at 11, col. 1; Jul. 29, 1980, §A, at 2, col. 6. See also NEWSWEEK, May 19, 1980, at 86. TIME, May 19, 1980, at 46.

4. N.Y. Times, Apr. 25, 1980, §C at 28, col. 1; May 9, 1980, §A, at 10, col. 1; May 10, 1980, §C, at 48, col. 3.

5. See *Dalrymple v. Corporation for Pub. Broadcasting*, No. 80-807 (N.D. Ga. May 12, 1980); *Muir v. Alabama Educ. Television Comm.*, No. 80-0607 (N.D. Ala. May 12, 1980); *Thorne v. Grossman*, No. 80-1827 (N.D. Cal. May 12, 1980); NEWS, MEDIA AND THE LAW, June-July 1980, at 8; *Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F.Supp. 186 (N.D. Cal. 1980) (dismissal of \$20 billion defamation suit brought against broadcasters by "representatives" of 600 million Muslims); NEWS, MEDIA AND THE LAW, Oct.-Nov. 1980, at 23.

6. In *Barnstone v. University of Houston*, 487 F.Supp. 1347 (S.D. Tex. 1980), a subscriber to and viewer of the local PBS station, owned and operated by defendant, was granted a temporary restraining order directing the station to air "Death of a Princess" at the scheduled time (May 12, 1980). The court issued the injunction on the basis that there was a substantial likelihood that the plaintiff would be able to establish a denial of her first amendment rights at trial. On the day scheduled for broadcast, the district court's order was vacated by the U.S. Court of Appeals for the Fifth Circuit on condition that appellants would tape and preserve the program for possible future broadcast. *University of Houston v. Barnstone*, No. 80-1527 (5th Cir. May 12, 1980). Later that same day, Justice Powell denied an application to vacate the order of the appellate court. *Barnstone v. University of Houston*, 466 U.S. 1318 (Powell, Circuit Justice, 1980). When the case came to trial, the T.V. station was ordered to broadcast the show within thirty days. *Barnstone v. University of Houston*, No. H-80-1048 (S.D. Tex. Dec. 18, 1980). The court was of the opinion that the state owned and operated T.V. station could not claim exemption from such a violation of first amendment rights:

The Court refuses to carve out such an exception to the Bill of Rights. To do so would in effect encourage the plainting [sic] of seedlings which, upon attaining full growth, would install the State of

It is not always the case that the indicia evidencing the impact of British security and foreign policy interests on her international trade, and hence the institutional interaction between government and private industry, operate outside of any *legal* framework. There is United Kingdom legislation⁷ requiring that a license must be obtained from the Department of Trade prior to the export of certain strategic goods. Aspects of this control regime have a limited extraterritorial effect.⁸ In a more positive vein, the Export Credits Guarantee Department (E.C.G.D.) is expressly empowered⁹ to take into account certain foreign policy objectives¹⁰ when considering requests for insurance for export credit advanced by U.K. businesses.¹¹ The Department need not apply commercial criteria only but may issue its guarantees to further foreign relations, typically with Third World countries.

Texas, through its University of Houston, as a kind of "Ministry of Truth" as portended in George Orwell's 1984. Such absolute control over what the people may see and hear will not be countenanced in 1980. *Id.* (citation omitted).

7. Import, Export and Customs Powers (Defense) Act, 1939, s.1., Emergency Laws (Re-Enactments and Repeals) Act, 1964, s.3(1). The current regulations in force by virtue of the above are, Export of Goods (Control) Order 1978, S.I. 1978 No. 796, as amended, and Strategic Goods (Control) Order 1967, S.I. 1967 No. 983, respectively. *See generally* C. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE 461-65 (7th ed. 1980) [hereinafter cited as SCHMITTHOFF], *United States v. Brumage*, 377 F.Supp. 144 (E.D.N.Y. 1974); Berman & Garson, *United States Export Controls—Past, Present, and Future*, 67 COLUM. L. REV. 791, Reynolds, *State Department—Arms Sales*, 10 LAW & POLY INT'L BUS. 101 (1978), Winter & Carlson, *Exporting Licensing: Uncoordinated Trade Repression*, 9 GA. J. INT'L & COMP. L. 333 (1979), Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739 (1981).

8. Strategic Goods (Control) Order 1967, Art. 1.

9. Export Guarantees and Overseas Investment Act 1978 c. 18. The authority given under the legislation is vested in the Secretary of State for Trade but exercised by E.C.G.D. (*id.* s.12(12)).

10. *See generally* SCHMITTHOFF, Ch.22; cf. Streng, *Government Supported Export Credit: United States Competitiveness*, 10 INT'L LAW. 401 (1976). At the European "federal" level, see Council Decision of September 27, 1960, 1960 J.O. 1339; Dec. 73/391/EEC, 1973 O.J. L346/1; Dec. 70/509/EEC, 1970 O.J. Sp.Ed. (III) 762; Dec. 70/510/EEC, 1970 O.J. Sp. Ed. (III) 782; Dec. 70/552/EEC, 1970 O.J. Sp.Ed. (III) 966; Dec. 71/86/EEC, 1971 O.J. Sp.Ed. (I) 71; Act of Accession, Art. 152.

11. The Export Guarantees and Overseas Investment Act 1978 s.2(1) states:

For the purpose of encouraging trade with other countries or for the

As one's definitional net is cast wider it is possible to identify some less obvious areas where the interests of the state and private corporations, or British foreign policy and foreign trade, either conflict or conjoin; the whole area of sovereign immunity,¹² the British "response" to the Arab boycott,¹³ and the extraterritorial nature of some foreign antitrust laws all have an impact. With regard to this last area, even the "special relationship" between Britain and the United States has been strained by the growing extraterritorial application of U.S. antitrust law¹⁴ and has led to robust reactions from both the judiciary¹⁵ and the legislature¹⁶ in Britain. In passing, it should be noted that there is a certain irony in this, in that "federal" Europe, to which Britain now belongs, is at the same time asserting the extraterritorial nature of its own antitrust laws.¹⁷

purpose of rendering economic assistance to countries outside the United Kingdom, the Secretary of State may, with the consent of the Treasury, make arrangements for giving such guarantees to, or for the benefit of, persons carrying on business in the United Kingdom as appear to him to be expedient in the national interest

12. State Immunity Act 1978 c. 33. See generally DICEY & MORRIS, *THE CONFLICT OF LAWS* 138-57 (9th ed. 1973; cum. supp. 1980); White, *The State Immunity Act 1978*, 1979 JBL 105; cf. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq.* (1976).

13. Goldstein, *European Views of United States Anti-Bribery and Anti-Boycott Legislation* 1 NW. J. OF INT'L. L. & BUS. 363, 367 (1979); Turck, *A Comparative Study of Non-United States Responses to the Arab Boycott*, 8 GA. J. INT'L. & COMP. L. 711, 722-726 (1978).

14. E.g., *United States v. Aluminium Co.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 133 F.Supp. 40 (S.D.N.Y. 1955), *motion for reargument denied*, 134 F.Supp. 710 (1955); Hacking, *The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America*, 1 NW. J. OF INT'L. L. & BUS. 1 (1979), Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L COMP. L.Q. 575 (1979).

15. *British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd.*, [1953] 1 Ch. 19 *interlocutory proceedings*, [1955] 1 Ch. 37, In Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No. 235, 21 C.M.L.R. 100 (1978 HL). See also Smith, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Nonproduction*, 14 VA. J. INT'L. L. 747, 761 (1964).

16. Protection of Trading Interests Act, 1980.

17. E.g., *Re Continental Can Company Inc.*, 11 C.M.L.R. D11 (1971 E.C. Commission), *rev'd on other grounds sub nom. Europemballage Corp. v. E.C. Commission*, 12 C.M.L.R. 199 (1973 ECJ); *Imperial Chem. In-*

An example of the continued search for a workable form of government-industry interaction in the realms of national security and foreign policy is to be found in the circumstances surrounding the enforcement of sanctions against Rhodesia. It is arguable that the failure of the Rhodesian oil embargo indicates the inability of the British government to harness fully the strength of the private sector to achieve foreign policy objectives. Moreover, the embargo's failure may be seen as further evidence of the general inappropriateness of economic sanctions given the worldwide context in which the private sector operates today.¹⁸

The unilateral declaration of independence by the government of the then Colony of Southern Rhodesia on November 11, 1965 drew condemnation from the United Nations¹⁹ and a reassertion by the United Kingdom Parliament of Rhodesia's colonial status.²⁰ At the same time the United Kingdom government was empowered by Parliament to impose sanctions on Rhodesia.²¹ Pursuant to that legislation, sanctions were imposed with respect to petroleum products.²²

dus. Ltd. v. E.C. Commission, 11 C.M.L.R. 557 (1972 ECJ); Hoffman-LaRoche & Co. A.G. v. Commission of the European Communities, 26 C.M.L.R. 211 (1979 ECJ); H. SMIT & P.E. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 3-13 (1976, 1981 Supp.), Kruithof, *The Application of the Common Market Anti-Trust Provisions to International Restraints of Trade*, 2 C.M.L. REV. 69 (1964), Allen, *The Development of European Economic Community Anti-trust Jurisdiction Over Alien Undertakings*, [1974/2] L.I.E.I. 35, Bellis, *International Trade and the Competition Law of the European Economic Community*, 16 C.M.L. REV. 647 (1979).

18. M. DOXEY, *ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT* 73-79 (2nd ed. 1980) [hereinafter cited as DOXEY], Wasserman, *Economic Sanctions—The Rhodesian Experience*, 9 J. OF WORLD TRADE L. 590 (1975).

19. U.N. Security Council Resolution, No. 216 November 12, 1965, 6 I.L.M. 167 (1966), No. 217 November 20, 1965 6 I.L.M. 167 (1966); Hopkins, *International Law—Southern Rhodesia—United Nations—Security Council*, 1967 C.L.J. 1.

20. Southern Rhodesia Act, 1965, c. 76, s.1. See generally, Dias, *The U.D.I. Case: The Grundnorm in Travail*, 1967 C.L.J. 5, Marshall, *The Legal Effects of U.D.I.*, 17 INT'L COMP. L. Q. 1022 (1968), Leigh, *Rhodesia After U.D.I. Some Aspects of a Peaceful Rebellion*, 1966 PUB. LAW 148, Macfarlane, *Pronouncing on Rebellion: The Rhodesian Courts and U.D.I.*, 1968 PUB. LAW 325.

21. Southern Rhodesia Act, 1965, c.76, s. 2(2)(c).

22. The Southern Rhodesia (Petroleum) Order 1965, S.I. 1965 No. 2140. This order was revoked and replaced by the Southern Rhodesia (United

That petroleum and petroleum products continued to reach the illegal Rhodesian regime despite the sanctions was generally known. In all probability this continued supply was also inevitable, given the sympathies of the South African government²³ and many of its citizens,²⁴ the Portuguese government²⁵ and the then Portuguese colony of Mozambique. The extent of the involvement of British companies in that continued supply did not become widely known, however, until the publication of a report in the United States,²⁶ a limited Senate investigation,²⁷ and, finally, the publication of the findings of an inquiry commissioned by the United Kingdom government.²⁸

This official inquiry determined that there had been a continued involvement by British oil companies in the supply of oil to the illegal regime throughout the period 1966-1975. During this period three phases were identified; subsidiaries of British oil companies located in southern Africa were involved during all three, but of more importance was the extent of the British parent companies' knowledge of their subsidiaries' activities.²⁹

According to the official report, petroleum products originally were supplied via the Mozambique subsidiary pursuant to contracts between the South African subsidiary and middlemen acting for the Rhodesians.³⁰ The second phase began in 1968 when

Nations Sanction) (No. 2) Order 1968, S.I. 1968 No. 1020 following U.N. Security Council Resolution No. 253, May 29, 1968 7 I.L.M. 897 (1968). See, DOXEY, *supra* note 18 at 65-73, Halderman, *Some Legal Aspects of Sanctions In The Rhodesian Case*, 17 INT'L COMP. L.Q. 672 (1968), Joyner, *International Sanctions*, 14 VA. J. INT'L L. 319 (1974). For the scope of the applicable sanctions regulations see T.H. BINGHAM & S.M. GRAY, REPORT ON THE SUPPLY OF PETROLEUM PRODUCTS TO RHODESIA (1978) Ch. II, §2.11-2.14 [hereinafter cited as BINGHAM].

23. *E.g.*, BINGHAM *supra* note 22 at Ch. III, §3.2-3.9; Ch. V, §5.9-5.13.

24. *E.g.*, BINGHAM, *supra* note 22 at Ch. V, §5.77-5.81.

25. *E.g.*, BINGHAM *supra* note 22 at Ch. V, §5.40-5.41.

26. THE CENTER FOR SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST, THE OIL CONSPIRACY (1976); *cf.* BINGHAM, Ch. XIII, §13.16.

27. Hearings before the Subcommittee on African Affairs of the Foreign Relations Committee of the United States Senate, September 17, 1976.

28. See BINGHAM, *supra* note 22. For BINGHAM'S terms of reference see *id.* at iii.

29. For BINGHAM'S factual conclusions see *id.*, Ch. XIV, §14.3.

30. *Id.* Ch. VII.

the involvement of the British-owned subsidiaries was disguised by an arrangement with the South African subsidiary of a French oil company. Those customers suspected of operating as middlemen for the Salisbury regime would receive their oil from this "French" source; an equal amount of oil then being transferred from the British-owned subsidiary in South Africa to the French-owned subsidiary.³¹ The third stage of the supply story began at the end of 1971 with the cessation of the exchange arrangement with the French and the direct involvement, once more, of the British-owned Mozambique subsidiary.³²

To a certain extent, it would be harsh to judge the first and third phases of this continued supply of "British" oil to the illegal Rhodesian regime as an example of the inability of the United Kingdom government to rely on the cooperation of the private sector in securing its foreign policy objectives; "harsh" because of the relative ignorance of the British-based parent companies as to the activities of their subsidiaries.³³ The second phase (the exchange agreement) however, was known to the parent companies³⁴ and, indeed, to the United Kingdom government.³⁵ Furthermore the government believed that it was continued with after 1971.³⁶ This second phase may, perhaps, be seen as an illustration of a more effective cooperation between the public and private sectors, as an effective compromise between economic and foreign policy interests and foreign policy interests competing *inter se*. This conclusion may be posited because the exchange agreement permitted the subsidiaries of the British-based companies to continue trading in countries sympathetic to the Rhodesian regime, avoided any more severe strain on Anglo-South African relations and yet enabled the British to honor the letter, if not the spirit, of the oil embargo and thus did not jeopardize United Kingdom foreign relations with other countries in Africa.³⁷ Any positive view taken of this episode should be

31. *Id.* Ch. VII, §8.2-8.13.

32. *Id.* Ch. VIII, §8.16-8.108.

33. *Id.* Ch. VI, §6.31-6.33, Ch. VIII, §8.13-8.74, Ch. XIV, §14.13-14.16, §14.20-14.27.

34. *Id.* Ch. VI, §6.54-§6.70, Ch. VIII, §8.7.

35. *Id.* Ch. VI, §6.71-6.85, Ch. XIV, §14.17.

36. *Id.* Ch. XIII, §13.19-13.23, Ch. XIV, §14.22-14.27.

37. *Id.* Ch. VI, §6.75-6.76, 6.85-6.86, Ch. XIV, §14.4 (xix), 14.19.

qualified by an appreciation of the embarrassment suffered by the government of the United Kingdom when not only the "exchange" agreement itself became publicly known but also the fact that the government did not know that it had ended.

The official inquiry made no recommendations as to the possibility of invoking the criminal sanctions available to the United Kingdom government,³⁸ and as peace came to Rhodesia-Zimbabwe with the signing of the Lancaster House agreement,³⁹ it is hardly surprising that no prosecutions have been brought. Nor is it surprising that the English civil courts have refused to entertain the matter.⁴⁰

Before the Lancaster House agreement was reached, the Rhodesian crisis had become a European as well as a British affair. This involvement arose not merely from European countries complying with the applicable Security Council Resolutions but also from the United Kingdom's accession to the European Economic Communities (EEC).⁴¹ As a postscript, therefore, to the Rhodesian example, it should be noted that Zimbabwe has now become the sixtieth signatory to the Lomé Convention,⁴² the trade and cooperation treaty between the EEC and African, Caribbean, and Pacific countries (EEC/ACP).⁴³

Indeed, it is in the European context that future developments with regard to the continued interaction between United Kingdom foreign policy and trading interests will take place. Although a founding member of NATO,⁴⁴ the Council of Europe⁴⁵ and other early European supranational organizations,⁴⁶

38. *Id.* Ch. XIV, §14.2.

39. 19 I.L.M. 387 (1980); *see also* Zimbabwe Act 1979.

40. *Lonrho Ltd. v. Shell Petroleum (UK) Ltd.*, The Times Law Report, THE TIMES (LONDON), December 1, 1980, §1, at 5, col.1. (denial of civil remedy based on possible breach of sanction orders).

41. Kuyper, *Sanctions Against Rhodesia: The EEC and the Implementation of General International Legal Rules*, 12 C.M.L. REV. 231 (1975).

42. BULL. EC 4-1980, point 1.4.1. ff; EUROFORUM, 10/80, p. 11; 12/80, p. 10; BULL. EC 11-1980, point 1.4.1. ff; 18/80, p. 10. *See also*, Reg. 3550/80, 1980 O.J. L372/1 (interim agreement between EEC and Zimbabwe).

43. 19 I.L.M. 327 (1980).

44. The North Atlantic Treaty, Washington April 4, 1949 (amended by Protocol, London October 17, 1951).

45. The Statute of the Council of Europe, London May 5, 1949 (amended May 22, 1951; December 18, 1951; May 4, 1953; May 30, 1958).

46. *E.g.* O.E.E.C. (Convention on European Economic Co-operation)

it was not until the United Kingdom's accession⁴⁷ to the EEC⁴⁸ that the trade aspects of her foreign policy became institutionalized at any level other than the purely national.

Space does not permit an outline of the origins of the EEC—a genesis involving economics, security, and post-World War II regionalism—nor of the disinterest originally displayed by the United Kingdom toward the Communities.⁴⁹ Suffice it to say that, since 1973, the United Kingdom's immediate—in the geographical sense—foreign policy and security interests have become inextricably linked to her economic interests within the quasi-federal structure of the EEC.

The repercussions of the United Kingdom's accession to the EEC are not limited to the immediate geographical area of Western Europe. The membership of the EEC has strained relations with former colonies, such as New Zealand, because of the Community's agricultural policy, and involved the United Kingdom in clashes of interest with traditional allies such as the United States.⁵⁰ Of still more importance is the fact that, as a

Paris April 16, 1948—later to become O.E.C.D. (Convention on the Organization for Economic Co-operation and Development) Paris December 14, 1960; European Convention for the Protection of Human Rights and Fundamental Freedoms Rome, November 4, 1950.

47. Treaty of Accession, Brussels, January 22, 1972; United Kingdom Membership became effective on January 1, 1973. For a contemporary view on the probable impact of accession on British foreign policy see Wallace, *British External Relations and the European Community: The Changing Context of Foreign Policy-Making*, 12 J. OF COMMON MARKET STUDIES 28 (1973).

48. The three European Communities (European Coal and Steel Community, Paris April 18, 1951; European Atomic Energy Community, Rome March 25, 1957 and the EEC) were effectively merged into one by The Convention on Certain Institutions Common to The European Communities, Rome March 25, 1957 and the Treaty Establishing A Single Council and A Single Commission of The European Communities, Brussels, April 8, 1965.

49. See generally A.H. ROBERTSON, *EUROPEAN INSTITUTIONS* (3rd ed. 1973) Ch. 1. [hereinafter cited as ROBERTSON]; D. LASOK and J.W. BRIDGE, *INTRODUCTION TO THE LAW AND INSTITUTION OF THE EUROPEAN COMMUNITIES* (2nd ed. 1976) Ch. 1; P.J.G. KAPTEYN AND P. VERLOREN VAN THEMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* (1973) Ch. 1. For a more detailed analysis see, E.B. HAAS, *THE UNITING OF EUROPE* (1968).

50. See e.g., *Aspects of the European Communities*, a report prepared for the Subcommittee on Europe and the Middle East of the Committee on Foreign affairs, U.S. House of Representatives (1979) pp. 34-41, Jackson, *United States-EEC Trade Relations: Constitutional Problems of Economic In-*

matter of law, it is the Community's supranational institutions that are responsible for matters relating to commercial policy,⁵¹ relations with international organizations,⁵² and the conclusion of association agreements with third countries.⁵³ Also, in very general terms, it has been established that whenever Community institutions have competence as to the internal market, they may also have external competence, arising by implication from the Treaty of Rome.⁵⁴

Notwithstanding the immense power placed in the hands of the Community institutions and the obviously close, indeed overlapping, relationship between such international trade matters and foreign policy concerns, the EEC institutions are not empowered to involve themselves directly in foreign policy or national security *strictu sensu*. The Treaty is concerned only with economic activity⁵⁵ and contains express national derogations

terdependence, 16 C.M.L. REV. 453 (1979). See also text accompanying notes 14-17 *supra*.

51. EEC Treaty arts. 112-114. The issue of Community competence is well settled; Opinion 1/75 Re The OECD Understanding on a Local Cost Standard, 17 C.M.L.R. 85 (1976 ECJ). The question of when such competence is exclusive is more complex; Opinion 1/79 Re the Draft International Agreement on Natural Rubber, 26 C.M.L.R. 639 (1979 ECJ). See Usher, 5 E.L. REV. 147 (1980). See Kapteyn, *The Common Commercial Policy of the European Economic Community: Delimitation of the Community's Power and the European Court of Justice's Opinion of November 11, 1975*, 11 TEXAS INT'L L.J. 485 (1976), Steenbergen, *The Common Commercial Policy*, 17 C.M.L. REV. 229 (1980). For the internal effect of such competence see e.g., Case 38/75 Customs Agent of the Dutch Railways v. Inspector of Customs and Excise, 17 C.M.L.R. 167, 177-178 (1976 ECJ).

52. EEC Treaty art. 229.

53. EEC Treaty art. 238. E.g. EEC/ACP Treaty *supra* note 43. See generally E. FREY-WOUTERS, *THE EUROPEAN COMMUNITY AND THE THIRD WORLD* (1980), Simmonds, *The Second Lomé Convention: The Innovative Features*, 17 C.M.L. REV. 415 (1980). The relationship between the EEC and many of the Lomé Countries was originally governed by EEC Treaty arts. 131-136.

54. Case 22/70 Re the European Road Transport Agreement; E.C. Commission v. Council, 10 C.M.L.R. 335 (1971 ECJ), Cases 3-4, 6/76 Officer Van Justitie v. Kramer, 18 C.M.L.R. 440 (1976 ECJ), Opinion 1/76 Re the Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels, 20 C.M.L.R. 279 (1977 ECJ), Case 61/77 Re Sea Fishery Restrictions; E.C. Commission v. Eire, 22 C.M.L.R. 456, 515 (1978 ECJ). In general, on the question of the exclusivity of this Competence, see Leopold, *External Relations Power of EEC in Theory and in Practice*, 26 I.C.L.Q. 54 (1977).

55. EEC Treaty arts. 2, 3.

with regard to security matters.⁵⁶ Nevertheless, given two recent institutional developments, the EEC may be seen as in the process of a de facto expansion of its competence into the realm of foreign policy involvement. The sidelining of adventurous ideas calling for a European Political Union⁵⁷ in favor of a more realistic European Political Cooperation⁵⁸ has provided the background for both of these institutional changes. First, at the 1974 Paris summit, the EEC countries created the European Council⁵⁹—effectively the EEC Council of Ministers meeting in the context of European Political Cooperation.⁶⁰ It is now feasible for the EEC member states to speak with one voice with regard to foreign policy and European security, and thereby to deal within one institutional framework with EEC issues, matters on the leading edge of Community competence,⁶¹ and traditional foreign policy or national security subjects.

Of far more importance in the context of this paper is the fact that, almost by definition, the European Council provides a forum to deal with the economic aspects of foreign policy. Thus, it was the European Council that not only condemned the Soviet invasion of Afghanistan but also laid down the European policy of ensuring that embargoed United States agricultural products would not be replaced from European sources.⁶² Similarly, it was under the auspices of European Political Cooperation that sanc-

56. *Id.* arts. 36 (2), 223.

57. See e.g., ROBERTSON *supra* note 49 at 293-7.

58. REPORT BY THE FOREIGN MINISTERS OF THE MEMBER STATES ON THE PROBLEMS OF POLITICAL UNIFICATION, BULL. EC 11-1970 p. 9; SECOND REPORT ON EUROPEAN POLITICAL COOPERATION ON FOREIGN POLICY, BULL. EC 9-1973 point 1201 ff, 11 C.M.L. REV. 114 (1974). See von der Gablentz, *Luxembourg Revisited or The Importance of European Political Cooperation*, 16 C.M.L. REV. 685 (1979).

59. BULL. EC 12-1974, point 1104, 12 C.M.L. REV. 143 (1975).

60. See generally Lauwaars, *The European Council*, 14 C.M.L. REV. 25 (1977).

61. See, e.g. Council statement on the denial of Human Rights in Uganda, a Lomé country, BULL. EC 6-1977, point 2.2.59. The Community was unable, however, to negotiate the incorporation of Human Rights provisions into Lomé II; see, Young-Anawaty, *Human Rights and the ACP-EEC Lomé II Convention: Business As Usual At the EEC*, 13 N.Y.U.J. INT'L POL'Y 63 (1980).

62. BULL. EC 1-1980, point 1.1.1. ff; DEPT STATE BULL. No. 2039, at 64 (June, 1980). See also BULL. EC 4-1980, point 1.1.15, BULL. EC 6-1980, point 1.1.9.

tions were imposed against Iran following the seizure of the American hostages.⁶³

The second major institutional change concerns the European Parliament. Its legal nature remains unchanged; it is still basically only a consultative body.⁶⁴ However, it has grown both in size and in importance now that it is directly elected rather than being composed merely of representatives of the parliaments of member states.⁶⁵ As the new Parliament has begun to assert itself, so also has it begun to interest itself in matters not dealt with by the Rome Treaty. Parliamentary question time is no longer concerned solely with mainstream EEC matters but also involves interrogatories addressed to the Council of Ministers meeting in political cooperation.⁶⁶ In addition, the Council President now reports to the Parliament on the activities of the European Council.⁶⁷ It remains to be seen, however, whether the European Parliament will become a major force in dealing with the economic aspects of foreign policy.

Nevertheless, the future is sure to bring further institutional changes to the Community,⁶⁸ and this future will surely see the EEC as the principal organ through which the economic aspects of foreign policy and national security are dealt with in Europe.⁶⁹

63. BULL EC 5—1980, point 1.5.1. ff; DEPT STATE BULL. No. 2039, p. 49 (June, 1980). Because the EEC lacks legislative competence in foreign policy areas, the decision to impose sanctions could not be implemented at the "federal" level, but had to be enacted into law by the individual member states. *E.g.*, in the United Kingdom, The Export of Goods (Control) (Iran Sanctions) Order 1980, S.I. 1980 No. 735, made pursuant to Import, Export and Customs Powers (Defense) Act 1939, s.1. Of course, such national legislation is subject to EEC Treaty arts. 224, 225. The Sanctions imposed by the U.S. government are detailed in DEPT STATE BULL. No. 2038, at 1. (May 1980).

64. *E.g.*, EEC Treaty art. 100. The only real powers of the Parliament are to ask questions, *id.*, art. 140, and to censure the Commission, *id.*, art. 144.

65. Council Decision of September 20, 1976, Dec. 76/787, O.J. 1976 L 278/1.

66. *See, e.g.*, O.J. 1981 C 28/29, C 49/5. cf. Lauwaars *supra* note 60 at 40-41.

67. *See, e.g.*, BULL. EC 11—1980, point 2.3.8.

68. *See, e.g.*, the report of the Three Wise Men, Comment, 17 C.M.L. REV. 3 (1980).

69. *Cf.* Goodwin, *A European Community Foreign Policy?* 12 J. OF COMMON MARKET STUDIES 7 (1973).